IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPEALLTE JURISDICTION.

CRIMINAL APPEAL NO. 448 OF 2005

Vijaykumar Xavier Francis ....
Appellant. V/s
(Orig.Accd.No.1)
The State of Maharashtra ....
Respondents.

Mr.V.T.Tulpule,Sr.Adv. With S.N.Chimade, N.D.Hombalkar and Rakesh Bhatkar, Adv. for the appellant.

Mr.V.B.K. Deshmukh, APP for the State.

CORAM: V.G. PALSHIKAR
AND
SMT.NISHITA MHATRE, J.

4th December, 2006.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No.281 of 1990 on 6.04.2005 the appellant-accused has preferred this appeal on the grounds mentioned therein.

2. With the assistance of the learned Advocate for the appellant as also the learned Public Prosecutor we have scrutinized the entire evidence on record and reappreciated the same.

3. The prosecution story stated briefly is that PW1-Vikas and the accused had grudge against each other. On 15.7.1989 in the evening

the complainant came from his shop and he was requested by the victim to accompany the victim to the night school. At that time the accused persons started abusing the complainant and therefore Laxmishah tried to intervene as a result of which accused Francis assaulted Laxmishah who received injuries therefrom and later on expired. The accused persons were arrested and prosecuted for various offences. The prosecution examined six witnesses to prove its case. The learned trial Judge on appreciation of evidence came to the conclusion that only original accused No.1-Vijaykumar Francis was guilt. He accordingly convicted him to suffer imprisonment for life under section 302 read with section 34 of Indian Penal Code. It is this order of conviction which is impugned in this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us by the learned advocate appearing on behalf of the accused.

4. PW1-Vikas is the only eye witness of incident. A scrutiny of his examination in chief and cross examination will show that the enmity was only with him and not with Laxmishah, the victim and yet the accused persons assaulted Laxmishah and not the witness. There are material contradictions and omissions in the evidence of this witness and yet the learned Judge relied on his sole testimony and convicted the appellant-accused.

5. PW1-Vikas the eye witness speaks only of one stab by the

accused No.1, medical evidence as given by the doctor however states that there were three injuries on the person of victim which the prosecution has not explained in any manner. If assault was allegedly by several persons one injury explained by the testimony of Vikas other injuries not proved at all, creates doubtful situation.

6. PW1-Vikas speaks of he being assaulted with cycle chain. There is no evidence available on record of such injuries on the person of PW1. The prosecution has failed to prove even recovery of the knife. Consequently, there is nothing on record on the basis of which it can be said that the accused assaulted the victim with the intention of causing his death. When the assault itself is in doubt it is difficult to sustain the conviction. It is pertinent to note that the victim has specifically said that the accused and others were five or six persons and all the accused started abusing the witness. All the accused according to witness started assaulting him with cycle chain but this statement of the witness is disbelieved by the learned trial Judge. As noted above the witness is emphatic on Francis giving one blow on the abdomen of Laxmishah as a result of which the victim went away and the accused also ran away. If that is so, the existence of three unexplained injuries create reasonable doubt as to who caused them and whether they were caused at the time when the assault was witnessed by the witness or thereafter. Because the eye witness left

the victim lying there and went to inform the police the witness was told that injured had been removed to Rajawadi hospital but there was some time gap between the witness seeing the assault and police taking away the body. The witness talks of one injury only by Francis and there are four injuries on the person of the victim. What happened after the witness left the place is not known. A doubt can therefore naturally arise in the mind of any prudent man as to whether it was accused No.1 who alone stabbed the victim or the victim was stabbed by some others after departure of this witness.

7. The police have failed to prove the recovery of knife at the instance of the accused. There is no motive for the accused persons to attack Laxmishah the victim when their target was PW1-Vikas. All these circumstances create a doubt in the mind of reasonable man regarding truthfulness of the prosecution story. Convicting a person in such circumstances is rather difficult. There is yet another aspect which is to be noted and it is the peculiar reappreciation of the evidence by the learned trial Judge. He has by his judgment acquitted all other accused persons and convicted only present appellant-accused. Yet the conviction is under section 302 read with section 34 of IPC. Who shared the common intention to commit murder of the victim with the accused is not known. Persons named and tried are acquitted and yet conviction is recorded under section 302 read with

section 34 of IPC. It is obviously an error of law committed by the learned Sessions Judge. In these circumstances we have no alternate but to accept the appeal and acquit the appellant-accused as not being guilty under section 302. In the result therefore the appeal succeeds and is allowed. Since the appellant-accused is in jail he is liable to be released forthwith unless otherwise required by the police.